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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

BILLY WAYNE WHITE

Petitioner

Versus

THE STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

ATTORNEY FOR PETITIONER:

LeRoy Peavy
608 Fannin, Suite 705
Houston, Texas 77002
Tel: (713) 224-8427
Texas Bar Number: 15699000

QUESTION PRESENTED

Whether the rule in Witherspoon v. Illinois, 391 U. S. 510 (1958), was violated by the exclusion for cause of a prospective juror during voir dire examination, without allowing counsel for petitioner to ask any questions whatsoever, after the prospective juror, in response to questions asked by the trial judge, stated that she had not thought about the death penalty, had no specific objections to it, could follow the law and write a death penalty in a proper case and could imagine a far out case in which a person should receive the death penalty and, then, further stated "I guess", "I feel" and "I don't think" that I could write the death penalty.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eight and Fourteenth Amendments to the constitution of the United States.

2. This case also involves the following provisions of Texas Law:

Texas Penal Code S12.31. Capital Felony.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Code of Criminal Procedure Article 37.01(b) Procedures in Capital Case.

(a) Upon a finding that the defendant is guilty of a capital offense, the Court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial Court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the Court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuation, if any, by the deceased.

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The Court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals with 60 days after certification by the sentencing Court of the entire record unless time is extended an additional period not exceeding 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgement of the Court of Criminal Appeals of the State of Texas, entered September 23, 1981, rehearing denied November 4, 1981.

CITATIONS TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at ____ S. W. 2nd _____ and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 W.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

STATEMENT

On complaint filed August 24, 1976, the Grand jury of Harris County, Texas, indicted Billy Wayne White, on August 26, 1976 for Capital Murder, alleging that, on or about August 23, 1976, he did intentionally cause the death of Martha Laura Spinks, by shooting her with a gun in the course of committing robbery against her.

After a trial by jury in the 176th District Court of Harris County, Texas which began on October 3, 1977, petitioner was convicted of capital murder and sentenced to death. The constitutional question now presented arises from the selection of the jury pertaining to the exclusion of the venire member, Barbara Jean Grace for cause on motion of the prosecution.

Upon presentment of the prospective juror, Grace, the Court, prior to any questioning or statements by counsel for the State or defense, proceeded to explain various laws to the prospective juror and questioned her regarding the death penalty. She, at first, answered affirmatively seven times, for the death penalty including such answers as having no specific objections to it, could follow the law and write a death penalty in a proper case and could imagine a far out case in which a petitioner should receive the death penalty. Upon further questioning by the Court, she expressed doubts about the death penalty and in one instance said she could not Write a death penalty. The prosecutor moved to excuse the juror, citing Article 1231 (b), Code of Criminal Procedure. The petitioner stated that he objected to the prospective juror being excused unless further question would be allowed by the defense. The Court excused the prospective juror without allowing the defense to ask any questions whatsoever.

In each and every instance in which she expressed negative thoughts and feelings about the death penalty, she used the works, "I guess" - "I feel" - "I think" or "I don't think" except in the one instance in which she stated, "Right". Now, I have to say no." In this particular instance she was asked if she could write a verdict that would represent the death penalty, after which she was asked to explain her answer and said, "No, I just could not do it. I just don't think I could."

The complete transcript of the questioning of Barbara Jean Grace is annexed as Appendix B. The relevant excerpts are the following:

QUESTIONING OF BARBARA JEAN GRACE, PAGE 261

JUDGE: "..... is there anything that would keep you, if you thought that it as proper, that would keep you from writing a verdict, finding an individual guilty and assessing the death penalty."

ANSWER: "No, I don't think so. I don't have any specific reasons right now."

JUDGE: "I didn't hear you."

ANSWER: "I can't think of any right now."

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JUDGE: "..... can you consider, in a proper case, death as a proper penalty?"

ANSWER: "Well, I guess I could, but I don't know if I would want to make that decision or not...."

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JUDGE: "....how do your feel about the death penalty?"

ANSWER: "Well, I never really though about it."

JUDGE: "Well you've reached a point where you have to think about it."

ANSWER: "I just don't think I want to give anybody death. I don't think I could."

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JUDGE: "How do you feel about the death penalty?"

ANSWER: "Well, I guess I'd have to go along with it if..."

JUDGE: "If you found a petitioner guilty?"

ANSWER: "If it's the law, I guess I'd have to go along with it."

JUDGE: "You feel that you could shoulder your responsibilities?"

ANSWER: "Yes, I feel that I could; but, it would still be a hard decision even at that time, you know."

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JUDGE: ".....could you assume that responsibility if you thought that it was proper and would write a death penalty?"

ANSWER: "Yes, I guess I could, but..."

JUDGE: "Now, see, you say you guess. "Well, you're not saying that under no circumstances would you ever consider the death penalty, are you? You can imagine a far out case in which the death penalty, if the law provides it, that a person should receive it, can you not?"

ANSWER: "Yes, I can imagine that."

JUDGE: "And if you reach that point to where somebody gave you that type of case, the evidence was there and you felt beyond a reasonable doubt that that was a proper verdict, could you and would you write that verdict?"

ANSWER: "I'm going to have to say no."

JUDGE: "Well, you're the only one that knows. Can you tell us why you would not?"

ANSWER: "Well, it's just that even though I know that, you know, death would be the proper verdict and everything, it just seems like in my heart I wouldn't be able to do that, I just couldn't. I just don't feel that I

could just say death to this person."

JUDGE: "You understand, of course, you would not be saying death. You would be writing the answers that you know would mean that the judge would be the one that would be sentencing the person to death. You understand that?"

ANSWER: "Uh-huh."

JUDGE: "And you would answer those questions so that the judge would not be forced to give the individual death; is that what you're saying?"

ANSWER: "Right. At least I would not give him death. So, therefore, I would want the judge to not give him death also."

JUDGE: "Consequently, you would make your answers so that he could not receive death as a penalty; is that right?"

ANSWER: "Yes, sir. Even though I know what's right, I know what you're saying, you know; but deep in my heart, I just don't feel like I could write death to a person. So, therefore, I would want the judge to consider not giving death to him."

JUDGE: "Well, Miss Grace, of course there's nobody that can find any fault with how you feel. You're the one that has to make that decision. I told you yesterday we would find no fault with you, didn't I?"

ANSWER: "Yes, sir."

JUDGE: "Nobody is going to find any fault. All we need to know, are you so precommitted that regardless of how right you thought it was you would never write a verdict that would represent the death penalty?"

ANSWER: "Right. Now, I have to say no."

JUDGE: "When you say no, explain that."

ANSWER: "No, I just could not do it. I just don't think I could."

"MR. URQUHART: I would make a motion, Your honor. I believe that the lady is being honest with the Court."

"MR. PEAVY: I'd like to ask her just a few questions, Your Honor."

"MR. URQUHART: Regardless of what she says now, I mean the record is clear at this point."

"MR. PEAVY: Just maybe the Court could ask her if there's any conceivable situation, such as a far-out situation like a terrorist or mafia member who was threatening everybody in the courtroom -- the question is whether there is some situation that she would consider the death penalty."

QUESTION: (By the Court) "I gather from what you tell me that there are no circumstances, are there, that you would ever consider the death penalty, or am I wrong?"

ANSWER: "No. Huh-uh. Even if it was a terrorist or something, I would still feel that in my heart, you know, that the judge would give some other penalty besides death. I just don't feel like I could do it."

"MR. URQUHART: I renew my motion."

"MR PEAVY: You Honor, we object to the witness being, the juror, prospective juror, being excused unless we have the opportunity to question her a little more thoroughly."

"THE COURT: Doesn't the statute make a provision? Is the Court limited after she has --"

"MR URQUHART: That's what I'm trying to say. Whatever he can get her to say now, the record is clear at this point how she feels."

"MR. PEAVY: Your Honor, I feel that I have a right to question a juror myself on behalf of the defendant."

"THE COURT: Get me the statute. I think the statue provides that after she has committed herself that the Court has no further right to question her or that either side does. Do you have the statute there?"

"MR. URQUHART: Judge, now there may be something in the Code of Criminal Procedure. I have 1231

(b): 'The judge must excuse the juror.'"

"THE COURT: All right. Thank you, ma'am. You will be excused. ***"

The jury ultimately selected convicted petitioner and sentenced him to die. Petitioner's challenge on appeal to the constitutionality of the exclusion for cause of venire member Grace was rejected by the Texas Court of Appeals, and this conviction and death sentence were affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief before the Texas Court of Criminal Appeals and his rehearing application addressed to that Court, petitioner contended that the exclusion for cause of prospective juror Grace had violated his right to a fair trial under the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court of Criminal Appeals rejected this contention in affirming his conviction and sentence and denying rehearing.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), WAS VIOLATED BY THE EXCLUSION FOR CAUSE OF A PROSPECTIVE JUROR, WITHOUT ALLOWING COUNSEL FOR THE DEFENSE TO ASK ANY QUESTIONS WHATSOEVER, WHO HAD ANSWERED THAT SHE HAD NO SPECIFIC OBJECTIONS TO THE DEATH PENALTY, COULD FOLLOW THE LAW AND COULD ALSO IMAGINE A CASE IN WHICH DEATH WOULD BE A PROPER VERDICT: FURTHER STATING THAT SHE DID NOT THINK OR FEEL THAT SHE COULD WRITE A DEATH PENALTY VERDICT.

At Petitioner's trial, a venire member was excluded for cause in clear violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). In fact, the prospective juror stated positively and affirmatively, to the effect that although she had not really thought about it, she had no specific reasons to oppose the death penalty and could follow the law and write a death penalty in a proper case. Upon further questioning by the Court, the prospective juror began to express opposition to the death penalty by answering "no" when asked if she could write a death penalty verdict; however in each and every instance of negative answers the prospective juror qualified and or explained her answer by making remarks such as, "I just don't think I could" and her final answer before being excused, "I just don't feel like I could do it."

At this juncture the prosecutor made a motion to excuse the juror in reference to Texas Code of Criminal Procedure, Article 1231(b), whereupon counsel for the petitioner asserted that he had a right to question the juror in behalf of the petitioner and objected to the prospective juror being excused. The Court excused the juror without allowing counsel for the petitioner to ask any questions whatsoever.

Petitioner contends, first,

that the prospective juror expressed only general sentiments and conscientious scruples against the death penalty which fall far short of an affirmation that she would automatically vote against the death penalty; thus, excusing her was in violation of the Witherspoon rule as stated in Granviel v. Estelle, 655 F. 2nd 673 (1981) holding that a venireman may be excused for cause only if he is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. In Granviel, ibid, as in Petitioner's case, the venireman who was excused qualified her negative answers by expressing the sentiments of not "thinking" or "feeling" they could vote to inflict the death penalty; second

Since the venireman stated that she could follow the law, could imagine circumstances in which the death penalty would be proper and could write a death penalty verdict, she represented her state of mind as to her views on capital punishment to be such, that, even though she had sentiments and doubts, she could put aside her personal feeling and follow the law; and third

In the alternative, that the venireman was prematurely excused, that counsel for petitioner had the right to question the juror to attempt to clarify her ambivalence, if any. In Burns v. Estelle, 626 F 2nd 396 (1980), the Fifth Circuit ruled that the trial Court erred in excusing veniremen for cause without allowing counsel for petitioner to question the veniremen when they expressed only general objections to the death penalty and could not take the oath as stated in Article 12.31 (b), Code of Criminal Procedure for the State of Texas.

Aside from these arguments, petitioner contends that the form of the questions asked the prospective juror precludes disqualification for the cause requested. The venireman was asked if she could "write" a verdict that would result in the

death of the petitioner. Inability of "write" the death penalty is not sufficient ground for dismissal as a prospective juror, Alderman v. Austin, 498, F. Supp. 1134 (1980), affirmed 663 F 2nd 558 (5th Circuit, 1981).

Briefly stated, petitioner contends that statements by the veniremen that she did not "feel" or "think" that she could "write" a death penalty verdict failed to express a state of mind for which she could be excused for cause without violation of Witherspoon. The venireman's statements that she could follow the law and could imagine a case in which the death penalty would be appropriate and could write a death penalty verdict expressed a state of mind which prohibits exclusion because of doubts and general objections to the death penalty, Burns v. Estelle, supra, 626 F 2nd 396, petitioner contends that venireman's ability to follow the law rehabilitates her from any and all doubts and considerations of a nature to disqualify her for cause: however, regardless of these considerations, counsel for petitioner should have been permitted to question the prospective juror regarding her ambivalence, if any, Burns v. Estelle, supra, 626 F 2nd 396.

CONCLUSION

Petitioner prays that the petition for writ of Certiorari be granted.

Respectfully submitted,

LeRoy Peavy
Attorney for Petitioner
608 Fannin, Suite 705
Houston, Texas 77002
Tel. (713)224-8427
Texas Bar Number: 15699000